COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 030105-00**

Robert Fernandes	Employee
MCI Cedar Junction	Employer
Commonwealth of Massachusetts	Self-insurer

REVIEWING BOARD DECISION
(Judges Fabricant, McCarthy and Horan)

APPEARANCES
Peter T. Zatir, Esq., for the employee
Robin Borgestedt, Esq., for the self-insurer

FABRICANT, J. The parties cross-appeal from a decision in which an administrative judge awarded the employee weekly benefits under G. L. c. 152, §§ 34 and 35, for an accepted work injury. We summarily affirm the decision as to the employee's appeal. Finding merit in the self-insurer's two arguments addressing the employee's return to work and the application of G. L. c. 152, § 35B, we reverse the decision in part.

The employee twisted his left knee while performing his duties as a correctional officer on August 3, 2000. The self-insurer placed the employee on temporary total incapacity benefits. The employee returned to work on March 9, 2003, but continued to experience pain and swelling in his knee. (Dec. 7.) He eventually left work again on or about May 1, 2003, and has not returned. (Dec. 7, 17.) The administrative judge found merit in the employee's claim for continuing temporary incapacity benefits and awarded benefits accordingly. (Dec. 18-20.) The judge also found that G. L. c. 152, § 35B, was applicable, as the employee had returned to work from March 9, 2003 until May 1, 2003. That statute provides:

> [A]n employee who has been receiving compensation under this chapter and who has returned to work for a period of not less than two months shall, if he is subsequently injured and receives compensation, be paid such compensation at the rate in effect at the time of the subsequent injury

> whether or not such subsequent injury is determined to be a recurrence of the former injury . . . .

G. L. c. 152, § 35B. The administrative judge acknowledged that the employee had returned to work for less than the two months required by the statute. However, the judge incorrectly determined that because the period in question equaled eight weeks, that element of § 35B was satisfied.[1] (Dec. 17.)

The judge's construction of G. L. c. 152, § 35B, is contrary to law. G. L. c. 152, § 11C. The plain language of the statute requires a period of *two months*, and thus the measure of this period cannot be made in days or weeks. Because the employee first returned to work on March 9, 2003, the earliest application of G. L. c. 152, § 35B, cannot be made before May 9, 2003. Therefore, we reverse the judge's finding that G. L. c. 152, § 35B, applies to the employee's claim.[2]

The self-insurer also argues that the judge erred by awarding benefits for the period during which the employee was back to full duty work, March 9, 2003 to May 1, 2003. We agree and vacate the award of § 34 benefits from March 9, 2003 through March 20, 2003, and the award of § 35 benefits from March 21, 2003 to May 1, 2003. (Dec. 20.)

Accordingly, the decision is reversed in part. We affirm in all other respects.

So ordered.

Filed: June 2, 2005

Bernard W. Fabricant	William A. McCarthy	Mark D. Horan
Administrative Law Judge	Administrative Law Judge	Administrative Law Judge

[1] In fact, the period from March 9, 2003 to (but not including) May 1, 2003 equals fifty three days, which is three days short of the judge's calculation of eight weeks.

[2] Despite finding that G. L. c. 152, §35B applies to this case, the administrative judge nevertheless ordered subsequent benefits based upon the original average weekly wage.